

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7600

Investigation into: (1) whether Entergy Nuclear )  
Vermont Yankee, LLC, and Entergy Nuclear Operations, )  
Inc. (collectively, "Entergy VY"), should be required to )  
cease operations at the Vermont Yankee Nuclear Power )  
Station, or take other ameliorative actions, pending )  
completion of repairs to stop releases of radionuclides, )  
radioactive materials, and, potentially, other non- )  
radioactive materials into the environment; (2) whether )  
good cause exists to modify or revoke the 30 V.S.A. )  
§ 231 Certificate of Public Good issued to Entergy VY; )  
and (3) whether any penalties should be imposed on )  
Entergy VY for any identified violations of Vermont )  
statutes or Board orders related to the releases )

Order entered: 5/14/2010

**ORDER RE:**

**MOTION TO MODIFY THE PREHEARING CONFERENCE MEMORANDUM AND  
TO ENLARGE THE TIME TO RESPOND TO PENDING DISCOVERY REQUESTS**

**I. INTRODUCTION**

On May 3, 2010, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (jointly, "Entergy VY" or the "Company") filed a motion<sup>1</sup> seeking to extend the time for them to respond to certain pending discovery requests that have been propounded by the following parties in this proceeding: Vermont Department of Public Service (the "Department"); the Agency for Natural Resources ("ANR"); the New England Coalition Inc. ("NEC"); and the

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1. The motion was entitled *Motion to Modify the Prehearing Conference Memorandum and to Enlarge the Time for Entergy VY to Respond to Pending Discovery Requests* (hereinafter the "Extension Motion").

Windham Regional Commission ("WRC").<sup>2</sup> In this Order, we partially grant the Extension Motion and direct Entergy VY to respond to all pending discovery requests no later than 10 days after the end date of the refueling outage presently underway at the Vermont Yankee Nuclear Power Station ("VY Station").

## **II. PROCEDURAL HISTORY**

On February 25, 2010, the Board opened this docket to investigate whether: (1) Entergy VY should be required to cease operations at the VY Station, or take other ameliorative actions, pending completion of repairs to stop releases of radionuclides, radioactive materials, and, potentially, other non-radioactive materials into the environment; (2) whether good cause exists to modify or revoke the Certificate of Public Good that the Board issued to Entergy VY pursuant to 30 V.S.A. § 231 on June 13, 2002, in Docket No. 6545; and (3) whether any penalties should be imposed on Entergy VY for any identified violations of Vermont statutes or Board orders related to those releases.<sup>3</sup>

On March 10, 2010, the Board convened a prehearing conference in this case. At that hearing, the parties were asked to offer recommendations for how to structure the procedural schedule for this docket.

On March 18, 2010, the Board issued a procedural order (the "Procedural Order") that: (1) defined the scope of the first phase of this docket;<sup>4</sup> (2) required Entergy VY to file direct testimony regarding certain topics;<sup>5</sup> (3) permitted other parties to conduct discovery upon

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2. The Extension Motion does not request any relief in regard to any discovery questions that have been served on Entergy by the Conservation Law Foundation ("CLF").

3. Docket 7600, Order of 2/25/10 at 1.

4. Docket 7600, Order of 3/18/10 at 1 ("The initial stage of this investigation will focus on . . . whether we can take action and what action we should take in response to the on-going releases of certain contaminants.")

5. The Order specifically stated:

Thus, we are establishing a schedule that requires Entergy VY to submit, within two weeks, sworn affidavits in the form of testimony explaining the following:

- What has happened and is happening now with respect to the releases?
- Where are the discharges located (to the extent that Entergy VY knows)?
- What is being released (including any contaminants), in what amounts, and where?

Entergy VY's testimony and to file responsive testimony;<sup>6</sup> and (4) expressed the expectation that parties would specifically address the scope of the Board's jurisdiction to grant relief in this docket after the filing of testimony in this case.<sup>7</sup> Finally, the Procedural Order set a schedule that established dates for testimony to be filed, discovery to be served and responded to on a 10-calendar-day rolling basis, as well as for briefs to be filed concerning the scope of the Board's jurisdiction in this docket.<sup>8</sup> Specifically, the Board established April 20, 2010, as the last date for parties to file discovery requests upon Entergy, and by implication, April 30, 2010, as the last date for Entergy to respond to any propounded discovery requests.

On May 3, 2010, Entergy VY filed the Extension Motion. Attached to the Extension Motion were two schedules containing discovery questions for which the Company requested leave to either defer answer at least temporarily (Schedule A and Schedule B) or to possibly not answer at all (Schedule B) pending a ruling from the Board that these questions deal with matters that are subject to federal jurisdictional preemption.<sup>9</sup>

On May 3, 2010, the Board issued a memorandum establishing a deadline of May 10, 2010, for parties to file comments on the Extension Motion.

On May 7, 2010, WRC filed a response to the Extension Motion (the "WRC Reply").

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- What steps is Entergy VY taking to find and fix the leaks?
  - What are the impacts of the release from an environmental, land use, public health, reliability, and economic standpoint, including any potential increase in the cost of decommissioning?

Docket 7600, Order of 3/18/10 at 3.

6. *Id.* ("Following Entergy VY's filing, other parties may engage in discovery on the testimony and file responsive testimony.")

7. *Id.* ("We would like the parties to address the jurisdictional questions more specifically prior to hearings, once the testimony has been filed and specific requests for relief have been made.")

8. *Id.* at 4.

9. Extension Motion at 15 and 20.

On May 10, 2010, responses to the Extension Motion were filed jointly by the Department and ANR (the "DPS/ANR Reply"), as well as by NEC (the "NEC Reply"), IBEW (the "IBEW Reply"), and CLF (the "CLF Reply").<sup>10</sup>

### **III. POSITIONS OF THE PARTIES**

#### **Entergy VY**

Entergy maintains that good cause exists for extending the discovery response deadline of April 30, 2010 (now expired), because it has been served with discovery "vastly exceeding" the volume and substance of what was contemplated in the Procedural Order.<sup>11</sup> The Company explains that a planned refueling outage is presently underway at the VY Station during which key personnel are serving critical functions and therefore are not available to respond to the allegedly voluminous pending discovery requests "with any reasonable efforts in the time allotted."<sup>12</sup> Entergy VY therefore wishes to delay responding to all remaining outstanding discovery requests until after the outage has been completed.

Entergy VY further seeks to defer responding to a subset of the discovery requests — which the Company believes are directed at "arguably preempted topics" that are outside of the scope of the Procedural Order for the first phase of this Docket — until such time as the Board has determined the scope of its jurisdiction in this case and the docket has moved into a second phase in which this discovery, in Entergy VY's judgment, "is relevant."<sup>13</sup> The Company argues that "it is unreasonable to require Entergy VY to respond *now* to hundreds of requests concerning radiological safety issues and plant operation when the Board has requested briefing on the extent

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10. The CLF Reply was joined by the Vermont Public Interest Research Group, the Connecticut River Watershed Council and the Vermont Natural Resources Council. The remaining parties to this proceeding did not respond to the Extension Motion.

11. Extension Motion at 1.

12. *Id.* at 2 and 8.

13. *Id.* at 3.

of the Board's authority to address these and other issues, and thus a determination on this jurisdictional question may moot the requested discovery."<sup>14</sup>

In moving to alter the schedule set out in the Procedural Order, Entergy VY has not requested that all deadlines in that schedule be adjusted to reflect the extension and other discovery relief the Company is seeking. Thus, notwithstanding its desire to place discovery on hold until the outage is concluded, the Extension Motion indicates that Entergy VY plans to adhere to the existing deadline of May 18, 2010, for filing a brief regarding the scope of the Board's jurisdiction in this case.<sup>15</sup> Finally, while the Extension Motion does contain a request to extend the May 5, 2010, deadline (now expired) for the other parties to file their direct testimony, the motion is silent on the issue of extending the scheduled briefing date for the other parties in the proceeding.<sup>16</sup>

#### IBEW

IBEW supports the Extension Motion because it "focuses on this Docket's purpose, its scope, management, and effective use of time and resources of the Board and the parties, as well as the best outcome for Vermont regarding the operation of Vermont Yankee."<sup>17</sup>

#### CLF

CLF supports extending Entergy VY's discovery response time until May 14, 2010, and, in consequence, extending all other deadlines previously established in the Procedural Order by two weeks.<sup>18</sup> CLF otherwise opposes the relief the Company has requested. CLF views the Extension Motion as "out of time, unjustified, unfairly prejudicial and dilatory."<sup>19</sup> CLF does not

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14. *Id.* at 8 (italics in the original).

15. *Id.* at 16 and 18.

16. *Id.* at 24.

17. IBEW Reply at 1.

18. CLF Reply at 1.

19. *Id.* at 3.

believe it is necessary to allow Entergy VY to defer responding to discovery until after the outage has been completed.<sup>20</sup> CLF also rejects Entergy VY's interpretation of the scope of discovery for this docket, citing V.R.C.P. 26(b)(1) for the proposition that the parties are entitled to broadly discover information that relates to the subject matter of this proceeding and is "reasonably calculated to lead to the discovery of admissible evidence." Thus, according to CLF, Rule 26(b)(1) in this case permits the discovery of information even if it "touches on issues of radiological health and safety." Finally, CLF contends that the Company's motion "has failed to show that the requested information is not likely to lead to discovery of admissible evidence."<sup>21</sup>

### NEC

Like CLF, NEC agrees that a limited extension of Entergy VY's discovery response time is warranted, as is a corresponding adjustment to the remainder of the schedule in the Procedural Order.<sup>22</sup> NEC does not support allowing the Company to postpone its discovery obligations until after the outage is complete. NEC believes an extension of this length would be "unreasonable, given that there is no confirmation that the tritium leak has in fact been resolved as Entergy claims."<sup>23</sup> According to NEC, several of its discovery questions relate to other possible sources of tritium contamination at the VY Station. If indeed there are other sources of tritium leaks, "then prompt action may be required of the Board to ameliorate the risks of those leaks."<sup>24</sup> However, until the Company answers NEC's questions, NEC cannot "provide testimony or make arguments regarding the source of tritium" at the VY Station. NEC therefore argues that a "10-14 day extension would provide enough time for Entergy VY to respond, while

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20. *Id.* at 5.

21. *Id.* at 3.

22. NEC Reply at 1.

23. *Id.* at 2.

24. *Id.* at 2.

allowing the parties to make arguments regarding ameliorative actions the Board should take prior to further harm caused by continued operation of the Plant."<sup>25</sup>

NEC further argues that Entergy VY should be required "to respond to all pending discovery requests before the parties are required to submit briefs regarding the Board's jurisdiction in this matter."<sup>26</sup> NEC reasons that the Company's discovery responses "are necessary in order for the parties to be fully informed and make comprehensive arguments regarding the Board's authority to take action to address the tritium leaks."<sup>27</sup>

### WRC

WRC supports extending Entergy VY's time to respond to all outstanding discovery requests until after the outage is complete.<sup>28</sup> WRC otherwise opposes the relief the Company has requested in the Extension Motion. WRC specifically opposes any requirement to file briefs concerning the scope of the Board's jurisdiction in advance of all parties completing discovery and filing testimony.<sup>29</sup> Like NEC, WRC takes the position that Entergy's discovery responses are needed in order to brief the jurisdictional question.<sup>30</sup>

### Department and ANR

The Department and ANR jointly support extending Entergy VY's time to respond to all outstanding discovery requests until 10 days after the conclusion of the outage.<sup>31</sup> With regard to Entergy's desire to defer answering certain discovery until the Board has determined the scope of its jurisdiction in this case, the Department and ANR argue that the Board should defer ruling on

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25. *Id.* at 3.

26. *Id.* at 12.

27. *Id.*

28. WRC Reply at 22.

29. *Id.* at 23.

30. *Id.*

31. DPS/ANR Reply at 2-3.

this request until the Company has duly filed a motion seeking such relief pursuant to V.R.C.P. 26(c).<sup>32</sup> The Department and ANR further recommend that Entergy VY be required to file its preemption brief on May 18, 2010, but that the Board permit the remaining parties to defer filing their preemption briefs "until after Entergy VY has provided the outstanding discovery and any Entergy VY motions seeking to limit that discovery have been resolved."<sup>33</sup>

#### **IV. BOARD DISCUSSION AND CONCLUSIONS**

Our consideration of the Extension Motion begins with a review of the applicable legal framework. Entergy VY moved for an extension of time and other discovery relief pursuant to V.R.C.P. 6(b) and V.R.C.P. 16.2, both of which apply to Board proceedings pursuant to Board Rule 2.214. Under V.R.C.P. 6(b), a court may use its discretion to grant an extension of time, for cause shown. Rule 16.2, in turn, authorizes a court to amend a scheduling order and directs that such an order "shall be determined with reasonable accommodation to litigants and their counsel and shall be modified where necessary to prevent manifest injustice." Significantly, neither one of these rules substantively deals with protecting a litigant from the allegedly "burdensome" and "onerous and overly broad" discovery that evidently prompted Entergy to file the Extension Motion.<sup>34</sup> Rather, such discovery complaints are governed by V.R.C.P. 26, which sets forth detailed standards and a process for resolving such issues.<sup>35</sup>

In the Extension Motion, Entergy VY seeks two forms of relief: an order granting an enlargement of time to respond to all discovery requests (Schedule A and Schedule B) until the outage at the VY Station is over, as well as an order excusing the Company at least temporarily — if not permanently — from answering a subset of the discovery requests (Schedule B) until the jurisdictional briefing in this docket is complete and has been ruled upon. Thus, if granted,

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32. *Id.* at 3-4.

33. DPS/ANR Reply at 2-3.

34. Extension Motion at 10 and 12.

35. *See* V.R.C.P. 26(c) (prescribing grounds for issuing a protective order) and (h) (describing good faith efforts required to attempt resolution of discovery disputes without court intervention, and otherwise prescribing filing requirements for seeking a protective order).



the Extension Motion in effect would amend the Procedural Order to institute a new sequence of procedural steps for the parties to take in preparing their substantive cases for hearings in this docket. Under the new order proposed by Entergy VY, all parties (with the exception of CLF, who has already received two rounds of responses from the Company) would file briefs concerning the Board's jurisdiction in advance of completing their discovery.

Turning first to the Company's request for an enlargement of time, the Extension Motion states that in discovery to date in this case, "Entergy VY has received several hundred distinct requests from multiple parties, including requests for voluminous production of documents, to which it would be impossible to respond with any reasonable efforts in the time allotted, particularly given the need of Entergy VY employees to safely and efficiently manage the scheduled outage that began last weekend."<sup>36</sup> Several other parties, in turn, respond that Entergy VY is a large, well-resourced company that must be presumed capable of conducting its operations while simultaneously meeting its regulatory obligations — in this case, by timely responding to lawful discovery requests in a Board proceeding.<sup>37</sup> In the end, though, all parties who have responded to the Extension Motion have expressed support for granting an extension of Entergy VY's time to respond to the pending discovery requests.<sup>38</sup> What is lacking is an agreement as to how long an extension should be approved.

We find, on balance, that the Company has demonstrated there is cause for granting an extension pursuant to V.R.C.P. 6(b): the public interest will be served by allowing the Company's key personnel to focus at this time on safely and efficiently completing the outage that is now underway. Furthermore, affording Entergy VY this additional time to complete and serve its discovery responses will ensure that the Company has a reasonable opportunity to deliver thoughtful and thorough answers to the many questions it has received.

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36. Extension Motion at 8.

37. *See, e.g.*, CLF Reply at 5.

38. CLF Reply at 1 (extension until May 14, 2010); WRC Reply at 1 (extension at least until end of outage); IBEW Reply at 1 (unspecified extension); DPS/ANR Reply at 3 (extension until 10 days after end of outage); NEC Reply at 12 (extension until no more than May 14, 2010).

Given that the Procedural Order originally provided for a 10-calendar-day discovery response time, and given further that we have accepted the need for key Entergy VY personnel to focus at this time on their outage responsibilities, we think it is appropriate to adopt the Department's suggestion of requiring the Company to respond to the pending discovery requests, by no later than ten days after the conclusion of the outage. The ten-day period shall begin to run on the first day of operation after the outage has ended.<sup>39</sup> Entergy VY must also notify the Board and parties in writing of the end of the outage on the same day operation resumes.

Having exercised our discretion pursuant to V.R.C.P. 6(b) to grant Entergy VY an extension of time to respond to pending discovery requests, it follows that it would be manifestly unjust to the remaining parties in this case if we did not adjust the remainder of the schedule to reflect the extension we have granted to Entergy VY.<sup>40</sup> Therefore, pursuant to V.R.C.P. 16.2, we hereby amend the schedule set forth in the Procedural Order as follows:

Ten calendar-days after Entergy VY files written notice with the Board that VY Station outage has ended	Entergy VY serves responses to all discovery requests pending as of April 30, 2010.
14 calendar-days after Entergy serves responses to all discovery requests pending as of April 30, 2010	Parties file testimony
14 calendar-days after parties file testimony	Entergy VY serves discovery requests upon Parties' testimony. Entergy VY's discovery period shall extend for fifteen calendar days on a rolling basis with 10-calendar-day responses.

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39. According to Entergy VY, the refueling outage began on April 24, 2010, and is expected to last one month. Extension Motion at 7. Thus, because the outage is likely to end by May 24, 2010, we conclude that NEC's interest in advocating for remedial action in regard to the tritium leaks will not be unduly prejudiced by our granting a discovery extension that is 10 days longer than the term of extension that NEC is willing to support. *See* NEC Reply at 2-3.

40. We stress that in making this determination of manifest injustice, we are in no way relying or ruling upon Entergy VY's claims that it is faced in this docket with responding to allegedly burdensome or overly broad discovery requests that lie beyond the scope of our jurisdiction. Our finding of manifest injustice is strictly confined to the impact of granting the Company's extension request without accounting fully for the impact of that extension upon the remaining deadlines and good order of process in this docket.

Ten calendar-days after Parties final discovery responses are due	All parties file direct briefs re: scope of Board's jurisdiction to take action in response to the releases of the contaminants at issue in this docket
Ten calendar-days after direct briefs are filed	All parties file reply briefs re: scope of Board's jurisdiction to take action in response to the releases of the contaminants at issue in this docket

At this time, we have not set a hearing date. We will establish such a date once we receive the testimony and have reviewed the briefs concerning jurisdiction. Meanwhile, Entergy VY remains free under this amended schedule to file its jurisdictional brief on May 18, 2010, if it so chooses.

Turning next to Entergy VY's wish to defer answering certain discovery requests pending a determination of our jurisdiction in this proceeding, we deny this request for relief. In our Procedural Order we stated that we expect "the parties to address the jurisdictional questions more specifically prior to hearings, once the testimony has been filed and specific requests for relief have been made."<sup>41</sup> The Extension Motion has presented no persuasive grounds for why we should now change the order of process that was first established in the Procedural Order. In reaching this conclusion, we wish to emphasize the significance we attach to observing the order of process established in the Procedural Order. We expect that the scope of the hearings will be shaped in large measure by the specific requests for relief that the parties will describe and discuss in their direct testimony and jurisdictional briefs, both of which, in turn, should be informed — and therefore preceded — by the discovery process for this initial phase.

Having exercised our discretion pursuant to Rule 6(b) to grant Entergy VY an enlargement of time to respond to discovery, and having exercised our discretion pursuant to Rule 16.2 to deny the Company's request to amend the Procedural Order to change the order of process in this case, we do not address in this Order the substantive arguments made by Entergy as to permissible discovery at this stage, nor do we address the arguments made by WRC and NEC in defense of their pending discovery requests.<sup>42</sup> This dispute is best characterized as an

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41. Procedural Order at 3.

42. See Extension Motion at 10 and 15-16; WRC Reply at 11-22; NEC Reply at 3-8.

issue concerning the scope of discovery, which is governed by V.R.C.P. 26(b). The Extension Motion did not seek any relief pursuant to V.R.C.P. 26, and therefore this discovery dispute is not properly before us.

**SO ORDERED.**

Dated at Montpelier, Vermont, this 14th day of May, 2010.

<u>s/ James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/ David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/ John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: May 14, 2010

ATTEST: s/ Susan M. Hudson  
Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)*